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Supreme Court, U.S.
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No. 97-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES MAY, *et al.*,

Petitioners,

v.

SHUTTLE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF USAIR, INC. AND SHUTTLE, INC. IN OPPOSITION

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below, applying the Railway Labor Act, properly declined to disturb the National Mediation Board's representational determination resulting in Petitioners' loss of union representation and properly interpreted such loss of representation as terminating any status quo obligation to continue prior collective bargaining agreement terms.

2. Whether state law claims arising from Petitioners' loss of union representation and loss of collective bargaining rights, including employee benefit provisions, are preempted by the Railway Labor Act and the Employee Retirement Income Security Act.

3. Whether an employee's claim for retirement benefits and severance pay presents any issue under the valid written release requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626, where the employer did not seek any waiver of severance claims from the employee upon retirement.

4. Whether, in applying the standards of *Texas Dep't of Community Affairs v. Burdine* and *McDonnell Douglas Corp. v. Green* to a summary judgment motion against claims under the Age Discrimination in Employment Act and the Employee Retirement Income Security Act relating to a corporate transaction, the court may give weight to the business justification for the transaction.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state the following: Effective February 1997, Respondent USAir, Inc. changed its corporate name to US Airways, Inc. US Airways, Inc. is a wholly-owned subsidiary of US Airways Group, Inc., a publicly-traded company, which prior to February 1997 was named USAir Group, Inc. For purposes of simplicity and continuity with the record below, the name USAir is used in this brief.

On December 30, 1997, Respondent Shuttle, Inc. was purchased by and is operated as a wholly-owned subsidiary of US Airways Group, Inc.

All other parties appearing before this Court and the courts below are identified in the Petitioners' Petition for Writ of Certiorari.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS USAIR, INC. AND SHUTTLE, INC. IN OPPOSITION

OPINIONS BELOW

The November 12, 1997 judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 129 F.3d 165. It is reprinted in the Appendix to the Petition for Writ of Certiorari, at 1a-3a. The Order and Memorandum Opinion of the United States District Court for the District of Columbia, Hon. Norma

Holloway Johnson, Judge, dated September 5, 1996, *May, et al. v. Shuttle, Inc., et al.*, No. 94 cv 01019, was not published. However, the District of Columbia Circuit adopted the entire opinion of the District Court on November 12, 1997 and published it as if it were an opinion of that Circuit. (Pet. App. 2a). The Memorandum Opinion which is, therefore, now the published opinion of the District of Columbia Circuit is reprinted in the Appendix to the Petition for Writ of Certiorari, at 4a-34a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated November 12, 1997, was entered when Petitioners' timely motion for rehearing was denied without opinion on January 9, 1998. (Pet. App. 35a-36a). This Court has jurisdiction to review the judgment of the District of Columbia Circuit Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The decision of the Court of Appeals for the District of Columbia Circuit involves the application of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

STATEMENT OF THE CASE

Petitioners, eighty-six former airline "fleet service" employees[1], challenge their loss of union representation in August 1992, the resulting loss of their collective bargaining agreement in August 1992, and their loss of employment in March or November 1993.

Petitioners initiated and pursued this litigation against Shuttle, Inc. ("Shuttle"), USAir, Inc. ("USAir"), the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"), and Citicorp and Citibank, N.A.[2] However, the Petition appears directed at only USAir and Shuttle. Petitioners' second amended complaint, filed on October 12, 1994, pled eighteen counts under the Railway Labor Act ("RLA")[3], the Age Discrimination in Employment Act ("ADEA")[4], the Employee Retirement Income Security Act ("ERISA")[5], the Workers Adjustment

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[1] Employees in the "fleet service" craft or class perform aircraft cleaning, baggage handling, and ramp functions. *USAir, Inc.*, 15 NMB 369, 389-90 (1988).

[2] Petitioners failed to name the National Mediation Board as a party, but the NMB participated as *amicus curiae* before the court of appeals.

[3] 45 U.S.C. § 151, *et seq.* (1994).

[4] 29 U.S.C. § 621, *et seq.* (1994).

[5] 29 U.S.C. § 1001, *et seq.* (1994).

Retraining and Notification Act ("WARN")[6], and myriad state law claims against the five defendants. Each of the claims directly or indirectly challenged the status of their union representation, labor contract, or employment.

To assist the Court in understanding the nature of Petitioners' claims, Respondents briefly review the corporate history of Shuttle and the transaction with USAir which gave rise to this litigation, the related representation decisions of the National Mediation Board ("NMB"), and the employment actions involving Petitioners.

A. The USAir-Shuttle Transaction

Petitioners' employer, Shuttle, was created in 1992 as the successor to Trump Shuttle, Inc. ("Trump Shuttle"). Trump Shuttle was formed by Donald Trump in 1989 to acquire the assets used by Eastern Air Lines in operating the Eastern Shuttle. The Eastern Shuttle operation consisted of hourly, non-reservation air service between New York, Washington and Boston. (Pet. App. 5a). The majority of Petitioners are former Eastern and Trump Shuttle employees who worked at LaGuardia Airport in New York, Washington National Airport in Arlington and Logan Airport in Boston. (*Id.*)

While working at Eastern, Petitioners were represented by the IAM, which also represented the Eastern mechanics. (Pet. App. 5a). When Trump Shuttle commenced operations in 1989 it voluntarily recognized the IAM as the representative of the mechanic and fleet service groups and, on July

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[6] 29 U.S.C. § 2101, *et seq.* (1994).

13, 1989, entered into a collective bargaining agreement with the IAM governing these classifications. (*Id.*) This 1989 Trump Shuttle Agreement is the claimed source of Petitioners' contract rights.

Trump Shuttle encountered financial difficulties, never made a profit, and by early 1990 was in dire financial straits. (Pet. App. 6a). Donald Trump and Trump Shuttle financed nearly 100% of Shuttle's purchase price and upgrade costs by borrowing $380 million from two bank groups (the "Banks") for which Citibank acted as agent. (*Id.* at 5a). By 1991, Trump Shuttle confronted imminent liquidation, sale of its assets and layoff of all of its employees. Rather than sell or liquidate Trump Shuttle in a depressed airline market, the Banks agreed to reorganize Trump Shuttle and attempt to improve its operating results in contemplation of selling the company at a later date. (*Id.* at 6a). As part of this effort, the Banks sought an established airline to manage the Shuttle. (*Id.*)

On April 10, 1992, USAir, Trump Shuttle, and the Banks entered into a complex restructuring resulting in Donald Trump transferring his ownership interest in Trump Shuttle to the Banks. Trump Shuttle was merged into a newly created corporation — Shuttle, Inc. — with Shuttle, Inc. being the surviving entity. Shuttle entered into a Management Agreement with USAir whereby USAir would manage Shuttle, with an option to purchase Shuttle after four and one-half years. In April 1992, USAir and Shuttle began

operating the former Eastern Shuttle and Trump Shuttle service as the "USAir Shuttle."[7] (Pet. App. 6a).

B. The NMB Proceedings

The USAir-Shuttle Management Agreement presented difficult and novel labor relations problems. The IAM, which represented the USAir mechanics and Shuttle fleet service employees, conditioned its approval of the management transaction on USAir agreeing to operate Shuttle and USAir as a "single carrier" for purposes of representation under the RLA. While agreeing to operate the two airlines as a "single carrier," and planning to integrate the ground employees (mechanics, fleet service, passenger service), USAir intended to maintain separate groups of flight personnel (*i.e.*, pilots, flight attendants and dispatchers). (Pet. App. 5a-6a). The flight personnel would be separated because Shuttle would continue to operate as a separate airline under its own operating certificates issued by the Department of Transportation and the Federal Aviation Administration (*id.*), and to facilitate sale of the airline in the event USAir did not exercise its option to purchase the Shuttle.

In order to operate USAir and Shuttle as a single carrier for representational purposes, a ruling from the NMB was

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[7] Well after the events giving rise to this litigation, Shuttle's corporate structure and public identity again changed. In February 1997, USAir changed its corporate name to US Airways, Inc. On December 30, 1997, US Airways Group, Inc. acquired Shuttle and it began conducting the operation under the name "US Airways Shuttle" during the first quarter of 1998.

required. The IAM and USAir understood that if the NMB ruled that USAir and Shuttle constituted a single carrier, the IAM's representation of the Shuttle fleet service employees would terminate because the larger group of fleet service employees at USAir was not represented by any union. (Pet. App. 7a). The IAM was attempting to organize the USAir fleet service employees and if the IAM won an anticipated election, it would represent the combined USAir and Shuttle fleet service employees. Both USAir and the IAM anticipated that the combined USAir fleet service group would vote to be represented.

USAir filed for single carrier status with the NMB on April 2, 1992. (Pet. App. 7a). The petition was filed pursuant to Subparts A, B, and E of the *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 NMB 388 (1987) ("Merger Procedures"). In this filing, USAir requested that the NMB find that, as a result of the assumption of management control of Shuttle by USAir, employees in the crafts or classes on Shuttle would be covered by the existing certifications or voluntary recognitions, if any, on USAir. The IAM, in a May 12, 1992 submission to the NMB, joined in invoking the NMB's representation jurisdiction under the Merger Procedures. (Pet. App. 7a).

On April 27, 1992, the United Steelworkers of America ("USWA") petitioned the NMB to represent the fleet service personnel at USAir. Pet. App. 7a; *see* Case No. R-6138, *USAir, Inc.*, 20 NMB 162 (1993). On the same date, the IAM filed an application seeking to represent USAir's fleet

service employees. Ballots were mailed to eligible USAir fleet service employees on July 10, 1992. Shuttle fleet service employees (including Petitioners) were sent "challenge ballots," which were segregated pending the outcome of the single carrier proceeding. *Id.*

On August 10, 1992, the NMB ruled that USAir and Shuttle constituted a "single transportation system" for purposes of union representation under the RLA. *USAir/ Shuttle*, 19 NMB 388, 421 (1992) ("single carrier decision"). As a result of this determination, all existing certifications on USAir were extended to Shuttle and all existing certifications on Shuttle were extinguished. The NMB also determined that the Shuttle fleet service employees would be eligible to vote in a then-pending election involving the USWA and the IAM. 19 NMB at 408, 417-18, 421.

The votes in the fleet service election were counted on August 11, 1992. Petitioners' "challenge ballots" were included in the count. Less than the majority of the eligible voters needed for certification voted. Consequently, no union was certified to represent the USAir/Shuttle fleet service employees. *See USAir, Inc.*, 20 NMB 162 (1993). USWA filed an objection to the conduct of the election. On January 28, 1993, the NMB rejected this challenge and dismissed the election applications. *Id.*

After the August 10, 1992 single carrier decision and the August 11, 1992 fleet service election, USAir, Shuttle and the IAM regarded the fleet service personnel at Shuttle as no longer represented by the IAM. Shuttle treated the fleet service group as non-contract employees and stopped

payroll deductions for their union dues in August 1992. On August 31, 1992 the IAM notified Petitioners that their union representation had terminated. Most of the Petitioners signed union withdrawal cards and Petitioners paid no union dues after August 1992. (Pet. App. 8a).

C. Changes in Petitioners' Employment Status

After August 11, 1992, Shuttle took no immediate action to change Petitioners' wages, benefits or day-to-day working conditions. In March 1993, several weeks after the NMB's January 28, 1993 decision certifying the August 11, 1992 election result, Shuttle began making significant changes in Petitioners' employment terms including increasing hours and reducing wages. (Pet. App. 8a). These changes to the employment terms of the fleet service group were not bargained with the IAM and no objections were made, or grievance filed, by the Petitioners.

In 1993, USAir and Shuttle decided that Shuttle's ground service employees would not be integrated into USAir unless and until USAir exercised its option to purchase the Shuttle. Integration was deferred because of difficulties encountered by the IAM concerning integrating the seniority of the very senior Shuttle mechanics and the resistant USAir mechanics. (Pet. App. 8a).

Following completion of the USAir-Shuttle Management Agreement in April 1992, Shuttle aggressively pursued numerous cost-cutting measures and service improvements. An essential part of the cost-cutting measures involved job force reductions in all classifications — management, pilots, fleet service, mechanics and flight attendants. From April

1992 to August 31, 1995, the total number of Shuttle employees was reduced from 972 to 553. (Pet. App. 8a-9a).

As a part of its cost-cutting efforts, in March 1993 Shuttle contracted with Hudson General Corporation, a nationally recognized airline services firm whose workers were represented by the IAM, to provide overnight airplane cleaning services. (Pet. App. 8a-9a). As a consequence of this, 30 Shuttle fleet service employees who had previously performed overnight cleaning services were furloughed on the basis of seniority.

In November 1993, Shuttle outsourced the remaining fleet service work to Hudson General, and all of Shuttle's remaining fleet service employees at all locations were furloughed. A total of 88 fleet service group employees were furloughed or elected retirement in lieu of furlough. (Pet. App. 8a-9a). The cost of Hudson General providing the fleet service work was 50% less than the Shuttle's cost to perform such services itself. Outsourcing the fleet service work saved Shuttle more than $2.4 million in 1994 and similar amounts annually thereafter. (*Id.*)

The Shuttle retirement plan applicable to fleet service employees contained an early retirement program which allowed all fleet service workers who were 55 years of age or older to elect to retire early. In November 1993, eligible fleet service workers were given the option of either (1) retiring under this existing program (with a one-time opportunity for certain enhanced benefits instituted by Shuttle) in lieu of being furloughed or (2) electing to be furloughed on the same terms as the younger fleet service employees who were not eligible for early retirement. The

early retirement program had certain benefits over the furlough including lifetime medical insurance and travel passes. The furlough program, conversely, had certain benefits over the retirement program (primarily additional severance pay). Eligible fleet service workers could choose either early retirement or furlough. The early retirement option was selected by nearly all of the persons eligible. All remaining fleet service workers were furloughed, provided with two weeks' pay in lieu of notice, and paid severance in accordance with the severance policy for non-contract employees.

D. The District Court Decision

On September 29, 1995, after extensive discovery, Shuttle, USAir, and the other defendants below filed comprehensive motions for summary judgment. Petitioners cross-moved for partial summary judgment. The district court heard oral arguments on all dispositive motions on June 21, 25, and 27, 1996. The district court concluded in its September 5, 1996 opinion that Petitioners' challenge under the RLA to their August 1992 loss of union representation and collective bargaining agreement was meritless as a matter of law. The court also concluded that Petitioners had failed to present a triable issue under ERISA, ADEA, WARN or state law with respect to their claims against Shuttle and USAir.

E. The Court of Appeals Decision

Continuing their blunderbuss litigation strategy, on October 29, 1996 Petitioners appealed from the district court decision on all claims under the RLA, ADEA, ERISA,

WARN, and state law. After argument on October 20, 1997, the court of appeals on November 12, 1997 issued its decision. In an unusual action, the court of appeals panel adopted in its entirety the district court opinion (Pet. App. 2a), writing briefly only to clarify the status of Petitioners' collective bargaining agreement. *Id.* Petitioners' request for reconsideration and suggestion of rehearing *en banc* was denied on January 9, 1998.

REASONS FOR DENYING THE WRIT

I Petitioners' Railway Labor Act and Fifth Amendment Challenge to Their Loss of Union Representation and the Resulting Loss of Collective Bargaining Agreement Rights Seeks to Invalidate a National Mediation Board Representational Determination and Present a Fifth Amendment Issue Not Developed Below.

1. No Constitutional Issue is Presented

In order to pique the Court's interest, Petitioners attempt to present this case as a constitutional issue under the Fifth Amendment. This is not a constitutional case. Neither the circuit court opinion (Pet. App. 1a-3a), nor the district court opinion (Pet. App. 4a-34a) which was adopted by the circuit court, makes any reference to constitutional issues. The complaint asserts no constitutional claims. The Petitioners have never challenged the constitutionality of any statute.

The only reference to the Fifth Amendment in the extensive briefing in this case is a single paragraph in the Reply Brief of the Appellants, filed September 19, 1997 in the District of Columbia Circuit, at 20-21. There, Peti-

tioners argued that the National Mediation Board's August 10, 1992 "single carrier decision" was invalid because it could impact existing collective bargaining agreement rights:

> As Judge Sporkin and Amicus recognize, it is banned by the Constitution itself. United States Constitution, 5th Amendment; *see Perry v. United States*, 294 U.S. 330 (1935). . . . Upholding the district court's contrary conclusion will negate the limitations imposed on the NMB by Congress and by the Constitution.

This obtuse passing reference on appeal was not sufficient to raise a constitutional issue below and does not present an issue worthy for constitutional review on petition for certiorari.

2. Petitioners' Challenge to Loss of Union Representation

The focus of Petitioners' case below was an attempt to invalidate under the RLA the National Mediation Board's representational determinations which resulted in Petitioners' loss of union representation. Petitioners lost their union representation in August 1992, as a result of the NMB's August 10, 1992 single carrier decision, *USAir/Shuttle*, 19 NMB 388, which combined the USAir and Shuttle employees for purpose of representation, and the August 11, 1992 election among the combined USAir/Shuttle fleet service group. *USAir*, 20 NMB 162 (1993). Because the unions lost that election, after August 11, 1992 the IAM and

USAir/Shuttle treated the Shuttle fleet service employees, including Petitioners, as unrepresented.[8] (Pet. App. 8a).

Petitioners asserted below that the NMB lacked jurisdiction to issue the single carrier decision because USAir, a carrier, initiated the merger-related case. Petitioners premised their case entirely upon the court of appeal's decision in *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1032 (1995) ("*RLEA v. NMB*"). In that case, the D.C. Circuit invalidated the NMB's *Railroad Merger Procedures*, 17 NMB 44 (1989), to the extent those procedures permitted carrier-invoked representation proceedings. But the district court properly found as a matter of fact and law that *RLEA v. NMB* had no application to this case, because "the unions joined the petition to invoke the NMB's jurisdiction." (Pet. App. 24a) .

Once the carrier-invocation issue of *RLEA v. NMB* was removed from this case by this finding of fact, the district court was constrained by the general nonreviewability of

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[8] Under NMB procedures, when the majority of a craft or class does not vote for some representative, the Board dismisses the representation application, and the entire craft or class remains or becomes unrepresented. *Jet Am. Airlines, Inc.*, 13 NMB 96 (1986); *Alitalia Airlines*, 10 NMB 331 (1983); *see Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Russell v. National Mediation Bd.*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); *International Bhd. of Teamsters v. Brotherhood of Ry., Airline and S.S. Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).

NMB representation determinations. The Court has repeatedly emphasized that the NMB's jurisdiction over representation disputes is exclusive and its certification decisions are nonreviewable, including representation determinations related to corporate transactions. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 303 (1943); *see also Western Airlines Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987); *Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *General Comm. of Adjustment of Bhd. of Locomotive Eng'rs v. Missouri K-T-R. Co.*, 320 U.S. 323, 336 (1943). Therefore, the district court correctly determined that it had no jurisdiction to review the Petitioners' loss of union representation pursuant to the NMB's representation procedures.

3. Petitioners' Challenge to Loss of Union Contract

Petitioners alternatively have attempted to attack the NMB's representational decision because of its impact on their collective bargaining agreement. They allege that the NMB's decision resulted in the "nullification of a collective bargaining agreement and employment rights." (Pet. 15). The district court did conclude correctly that "when plaintiffs were combined with the much larger group of USAir fleet service workers and the combined vote resulted in no union representation, plaintiffs' representation and collective bargaining agreement necessarily terminated." (Pet. App. 27a). That principle — *no union / no collective bargaining agreement* — is well-established under the RLA. *International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163-64 (5th Cir. 1983). *See also Association of*

Flight Attendants v. USAir, Inc., 24 F.3d 1432 (D.C. Cir. 1994); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976).

The court of appeals clarified this portion of the district court's decision by examining the precise status of Petitioners' collective bargaining agreement prior to the NMB's decision:

> We note, however, that the collective bargaining agreement between Trump Shuttle, Inc. and the International Association of Machinists and Aerospace Workers expired on December 31, 1989. Thereafter, the only function the agreement could have performed would have been to serve as the temporary 'status quo' while the parties pursued the 'major dispute' collective bargaining procedures of Sections 5 and 6 of the Railway Labor Act. But for the reasons made clear by the district court, Shuttle could have been under no obligation to engage in such bargaining in the absence of a certified representative with which to bargain. Therefore it is unnecessary for us to decide whether any terms of a collective bargaining agreement may survive the loss of union representation (an issue which we previously addressed in passing).

(Pet. App. 2a). Petitioners did not have contractual rights immediately prior to August 11, 1992 — they had a statutory right to the temporary continuation of their expired contract's

terms pending negotiations under Section 6 of the RLA. 45 U.S.C. §156.[9]

This analysis by the circuit court dooms any attempted Fifth Amendment challenge to Petitioners' loss of their collective bargaining agreement. Petitioners did not have a "property right" in a collective bargaining agreement; they had a temporary statutory protection of rates of pay, rules, and working conditions while their union negotiated on their behalf. Once their union lost representation status through the NMB's procedures, the statutory protection of the RLA "status quo" necessarily disappeared.

4. Petitioners' Challenge to Findings of Fact

Petitioners' arguments under the RLA and the Constitution ultimately are premised on a denial of two central findings of the lower courts: (1) that the unions invoked the NMB's jurisdiction to determine the representational status of Petitioners and other USAir/Shuttle employees, and (2) that the Petitioners' collective bargaining agreement had expired by its terms on December 31, 1989. Such factual challenges do not belong before this Court and vitiate Petitioners effort to present an issue under the RLA, or the Fifth Amendment justifying certiorari.

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[9] The Section 6 "status quo" requirement mandates that the parties continue an agreement's terms until they exhaust the RLA's negotiation procedures, thus extending the terms of a collective bargaining agreement beyond its stated duration. *See Detroit & Toledo Shore Line Co. v. United Transp. Union*, 396 U.S. 142, 150-153 (1969). *See also Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 504-12 (1989).

II This Case Is Not an Appropriate Vehicle for Reviewing Preemption under the Railway Labor Act or the Employee Retirement Income Security Act.

Petitioners attempt to present RLA and ERISA preemption issues, asserting that they raised "valid state law claims for breach of contract, common law fraud, and breach of fiduciary duty" (Pet. 3) and that the lower courts failed to apply the preemption standards of *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

The district court's discussion of preemption, adopted by the court of appeals, is terse: "The Court rejects all of plaintiffs' state law claims because such claims are clearly preempted by the RLA or ERISA." (Pet. App. 28a). The lack of full exposition by the district court or the court of appeals on this issue alone is sufficient grounds for denial of certiorari.

The reason for the lower courts' summary rejection of Petitioners' state law claims as preempted relates to the nature of the claims *as presented by the Petitioners*. Petitioners' state law claims were simply an effort to circumvent their loss of union representation and collective bargaining agreement by operation of the RLA, and to assert under common law that they had "no furlough" protection equivalent to their expired collective bargaining agreement. (Pet. App. 68a). That Petitioners' state law claims were artfully pled issues relating to collective bargaining, and controlled by the RLA, is suggested by Petitioners' description of those claims:

> that the respondent carriers and union fraudulently mislead petitioners as to the nature of the proceedings being pursued in their names, made promises to them concerning their employment which they did not intend to keep, breached their contract of employment, and failed to represent them in good faith before the NMB and thereafter.

(Pet. 18). Clearly, Petitioners through these claims were raising issues of duty of fair representation by the union, duty to bargain in good faith by the carriers, and breach of the collective bargaining agreement, which are all controlled by the RLA.

Respondents argued to the lower courts that Petitioners' state law claims were a preempted effort to circumvent the RLA, citing *Adkins v. General Motors Corporation*, 946 F.2d 1201, 1210 (6th Cir. 1991), *cert. denied*, 504 U.S. 908 (1992) ("The purpose of the doctrine of complete preemption is to prevent one set of rights and obligations from issuing from a collective-bargaining agreement under federal law while contradictory rights and obligations flowed from state law . . . . Plaintiffs cannot be permitted to revive rights deemed extinguished under federal labor law by relying on state common law."). The district court and the court of appeals implicitly accepted Respondents' argument under *Adkins* and rejected Petitioners' state law claims as preempted by the RLA.

Petitioners' state law claims also were pled with repeated references to the alleged denial of pension benefits. For example, the Fourth Claim ("Breach of Covenant of Good Faith and Fair Dealing") alleged that Respondents violated state law by "reducing and interfering with Plain-

tiffs' pension rights and benefits to which they were entitled under a plan governed by ERISA." (Second Amended Compl. Paragraph 140). It is not surprising that the district court summarily applied ERISA preemption to such state law claims.[10]

There is no basis in the record of this case to conclude that the lower courts adopted or applied an inappropriate standard of either RLA or ERISA preemption. Consequently, this case does not present an appropriate vehicle for the Court to examine or give guidance on the appropriate scope of RLA or ERISA preemption.

III Petitioners Present an Issue under the Older Workers Benefit Protection Act, 29 U.S.C. Section 626(f), and *Oubre v. Entergy Operations, Inc.*, Concerning the Validity of an Alleged Waiver Which Also Was Not Developed below.

Petitioners attempt to present a validity of written waiver issue under the Older Workers Benefit Protection Act, 29 U.S.C. Section 626(f), and the Court's decision in *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S. Ct. 838 (1998). This is another issue that was not pled or developed below.

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[10] As the district court recognized, Petitioners reliance on *Varity Corp. v. Howe*, 516 U.S. 489 (1996), is also misplaced. (Pet. App. 16a). *Varity* dealt with a claim of breach of fiduciary duty by an employer; Petitioners' claims were all pled under Section 510 of ERISA. And *Varity* provides no basis for limiting ERISA preemption in this case.

There is no issue in this case concerning the validity of a written waiver. No issue under Section 626(f) was ever pled by Petitioners below. There is no discussion of Section 626(f) in the district court or court of appeals decisions. And there was no issue below related to the *Oubre* question of the retention of settlement benefits.

The only reference to Section 626(f) in this case, once again, was in a passing reference in the Reply Brief of the Appellants filed September 19, 1997 in the District of Columbia Circuit, at 5. Therein, in discussing those retirement-eligible Petitioners who were offered a choice of retirement in lieu of furlough, Petitioners made a single reference to Section 626(f):

> The period was not thirty days, but hours. They had to make their 'choice' on the day they were furloughed. . . . This violated the OWBPA in at least two aspects: (1) they were not given 45 days to consider their choice (21 days if not part of an exit interview); (2) they were not told in writing to consult an attorney. 29 U.S.C. §§ 626(f)(F), (E).

This subgroup of Petitioners (Barone, *et al.*) had raised below an issue under the ADEA: they claimed that they were wrongfully denied *both* retirement benefits *and* the same severance pay given to junior employees. The issue litigated below was *not* the form of their election under Section 626(f), but Petitioners' claim that they were entitled to dual benefits. Respondents never argued that Petitioners signed written waivers that precluded them from pursuing litigation claims for retirement benefits and severance pay.

The district court addressed the dual benefits issue presented and concluded that Petitioners were not discriminated against on the basis of age because the retirement eligible employees were not treated more adversely than junior employees. (Pet. App. 22a-23a). The district court did not opine on Section 626(f), because there was no written waiver issue presented.

Thus, this litigation does not present *any* issue under OWBPA Section 626(f) and *Oubre*, let alone one that warrants consideration by the Court on petition for certiorari.

IV Petitioners' Assertion That the Courts below Applied a Heightened Burden of Proof Standard Newly Adopted by the Lower Court Is Unsupported and Presents No Issue under the Age Discrimination in Employment Act or the Employee Retirement Income Security Act.

Petitioners assert that the district court decision adopted by the court of appeals applied a "new, heightened burden of proof standard" (Pet. 24) unsupported by this Court's prior decisions. Petitioners' argument plainly mischaracterizes the lower court decisions.

The district court in granting summary judgment on the ERISA claims expressly applied the standards of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991). (Pet. App. 10a-11a). In granting summary judgment on the ADEA claims, the district court applied *Burdine*, *Hazen Paper Co. v.*

Biggins, 507 U.S. 604 (1993), *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), and *Cuddy v. Carmen*, 694 F.2d 853 (D.C.Cir. 1982). (Pet. App. 16a-17a).

What Petitioners apparently are challenging is the district court's citation to *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995), as part of its ERISA analysis. (Pet. App. 10a, 14a). In *Andes*, the D.C. Circuit opined that in a corporate transaction such as a closure or sale, the plaintiffs' burden of proof requires them to show that they were selected based upon "some ERISA-related characteristic special to the unit." *Id.* at 1338. *Andes* does not articulate a new standard under ERISA — it applies the *Burdine* standard to the facts of a corporate transaction. *Andes* recognizes that in such circumstances, the employer can articulate a strong business justification for the transaction, which the plaintiff bears the burden of rebutting by showing the corporate justification to be pretextual. Petitioners have identified no division in the circuits concerning the *Andes* analysis of ERISA claims in a corporate transaction context.

Because the district court applied controlling standards under ERISA and ADEA, and Petitioners have identified no need for clarification by the Court on this issue, there is no basis for certiorari.

CONCLUSION

For the foregoing reason, the petition for writ of certiorari should be denied.

Respectfully submitted,

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